

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 424 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

=====

1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO  
1 Yes  
2 to 5 No

-----  
ANJALI KAMAL MANGALDAS

Versus

SHRENIK KASTURBHAI LALBHAI

-----  
Appearance:

MR MJ THAKORE for MR UNMESH D SHUKLA for Petitioner  
MR AJ PATEL for MR VS PARIKH for Respondent No. 1  
MR SUNIT S SHAH for Respondent No. 5

-----  
CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 18/10/1999

ORAL JUDGEMENT

The appellant plaintiff has challenged the  
validity of an order dated 26.4.99 passed below Ex. 6 by  
the Chamber Judge, Court No. 6 of the City Civil Court  
at Ahmedabad in Civil Suit No. 3890/96.

2. Looking to the facts of the case and development which had taken place in the course of hearing of this appeal, I do not think it necessary to narrate the facts of the case in detail. Suffice it to state that the appellant plaintiff has challenged validity of a will executed by her aunt Smt. Sarojini Hutheesing dated 25th May 1987. The testatrix expired on 21st September 1988. The will has been mainly challenged on the ground that the testatrix was not having a sound and disposing mind at the time of execution of the will and though it was necessary to obtain probate, the will was not probated and therefore it has been prayed in the suit that the executors be prevented from taking any action for disposal of the properties bequeathed under the will.

3. Sr. Advocate Shri M.J. Thakore appearing for the appellant plaintiff has vehemently submitted that for the reasons stated in the plaint, by an interlocutory order the executors ought to have been prevented from dealing with the properties disposed of under the will but as the trial court has not granted the application below Ex. 6, the impugned order is bad in law and therefore this court should interfere with the impugned order.

4. On the other hand, learned advocate Shri A.J. Patel has submitted that it is not at all necessary to obtain probate in respect of the will in question for the reason that immovable property situated at Bombay is not a property which can be transferred in normal course because the property is a rented premises and therefore it is not necessary to obtain probate. It has been further submitted by him that the testatrix was having a sound and disposing mind while executing the will. It has been submitted by him that the will was executed in presence of a physician and a lawyer and the said persons are witnesses to the execution of the will. He has therefore submitted that the trial court was justified in rejecting the application below Ex. 6 and he has also supported the reasons assigned by the trial court for rejecting the application below Ex. 6.

5. The learned advocates appearing for the appellant and respondents have cited several authorities in support of their submissions. Looking to the peculiar facts of the case and the development which has taken place during the hearing of the appeal, I do not think it necessary to refer to any of the authorities.

6. In the course of hearing of the arguments it was submitted by the learned counsel for the plaintiff that

if the executors of the will i.e. original defendants Nos. 1, 2 and 3 are not suitably prevented from disposing of the properties belonging to the testatrix, the natural heirs who would be inheriting the properties of the testatrix would be left high and dry and they would not be in a position to get anything. It has been submitted by him that in fact one property, being land situated in Shahibaug area, has already been disposed of in favour of defendants Nos. 5 to 7. Consideration has also passed to defendant No. 4, the trust to whom the said property has been bequeathed under the will. Defendants Nos. 1, 2 and 3 who are the executors of the will are also trustees of defendant No. 4 trust.

7. It is true that if ultimately the plaintiff succeeds and the will is set aside, the heirs of late Smt. Sarojini Hutheesing including the appellant might face difficulties in getting the properties which they would have otherwise inherited in accordance with the provisions of the Hindu Succession Act, 1956.

8. It is pertinent to note here that except the appellant plaintiff, no other legal heir who would have otherwise inherited the properties of late Smt. Sarojini Hutheesing under the provisions of the Hindu Succession Act, 1956 has come forward to challenge the validity of the will. On the contrary, it appears that everyone, other than the appellant plaintiff, has supported the will.

9. It is not in dispute that if the will is not proved, the plaintiff would receive approximately 7% of the total assets. As stated hereinabove, only one of the properties bequeathed under the will has been disposed of so far and other properties have yet not been disposed of by the executors.

10. Looking to the facts stated hereinabove, learned counsel Shri A.J. Patel has fairly submitted that the executors of the will and defendant No. 4 trust which has inherited substantial properties of the testatrix are prepared to keep aside more amount than what in normal circumstances the plaintiff would have inherited. It has been submitted by learned advocate Shri Patel that 8% of the sale proceeds realised from the sale of the land situated at Shahibaug will be invested by the trust in such a manner that, in the event of the plaintiff succeeding in the suit, the amount which might become payable to the plaintiff can be paid to her within a period of 2 to 3 months.

11. Sr. Advocate Shri Thakore has submitted in reply to the said submission made by Shri Patel that possibly the land was sold at a lesser price and looking to the value of the property at least Rs. 30 lacs could have come to the share of the plaintiff. Learned advocate Shri A.J. Patel has promptly responded that if the plaintiff has an impression that the property could have fetched an amount which would have enabled the plaintiff to get Rs. 30 lacs as her share, defendants Nos. 1 to 4 are prepared to keep a sum of Rs. 30 lacs aside so that interest of the plaintiff may not be adversely affected. To this proposal, naturally, Sr. Advocate Shri Thakore could not give any reply.

12. It has been also submitted by learned counsel Shri A.J. Patel that before the present suit was filed, Civil Suit No. 1869/95 was filed in the City Civil Court at Ahmedabad by the plaintiff on 27.3.95. In the said suit validity of the will in question has been challenged. It is pertinent to note that the ground of challenge in the said suit is different. Though an application below Ex. 5 for interlocutory injunction has been filed in the said suit, no effort has been made by the plaintiff to get the said application heard. Even when the application below Ex. 6 filed in the present suit i.e. Civil Suit No. 3890/96 was being heard, the application below Ex. 5 filed in Civil Suit No. 1869/95 was also notified and was to be heard but for the reasons best known to the plaintiff, the application filed in the earlier suit was not pressed for hearing. It has been therefore submitted by learned counsel Shri Patel that looking to the above-referred behaviour of the plaintiff it appears that the suits have been filed with some oblique motive.

13. Looking to the facts and circumstances of the case and especially in view of the fact that the plaintiff is the only person who has challenged the will, I think it would be just and proper to direct defendants Nos. 1 to 4 to see that the amount which the plaintiff could have inherited as per the provisions of the Hindu Succession Act, 1956 should be kept aside by defendant no. 4 Trust. Ld. Counsel Shri A.J. Patel appearing for defendants Nos. 1 to 4 has shown willingness of the said defendants to keep aside Rs. 30 lacs at present and it has been further submitted by him that as and when any property bequeathed under the will is disposed of, from the sale proceeds of the property, 15% of the amount shall be invested in securities so that if the plaintiff succeeds, the trial court can award the amount payable to the plaintiff from the amount kept aside.

14. I think that instead of entertaining the appeal, and staying the proceedings, it would be just and proper if defendants Nos. 1 to 4 are suitably directed to see that certain amount as stated hereinabove is kept aside so that ultimately in the event of the will being set aside, no irreparable damage is caused to the plaintiff and her interest is sufficiently protected. In that event, the interest of the plaintiff shall not be adversely affected because even as per the plaintiff's case the plaintiff is not entitled to more than 7.5% of the assets of the deceased if the will is not proved and the assets of the deceased are distributed amongst the heirs of the deceased. Though calculating the amount receivable by the plaintiff as per the above-referred share, the plaintiff would be getting less amount from the sale proceeds of the property which has already been sold but as Sr. Advocate Shri Thakore has submitted on behalf of the plaintiff that, in fact, the property could have fetched more amount, learned counsel Shri A.J. Patel has agreed to keep Rs. 30 lacs aside so that in the event of the plaintiff succeeding in the suit, the amount which might be directed to be paid to the plaintiff by the trial court could be given to the plaintiff from the said amount.

15. If the above course is adopted, balance of convenience would also be maintained because in that event, execution of the will would not be prolonged. Interest of the plaintiff would be protected and no irreparable damage would be caused to the plaintiff or to other heirs and even to the purchasers of the property which has already been sold.

16. Looking to the facts and circumstances stated hereinabove and more particularly in view of the statement made by learned counsel Shri A.J. Patel appearing for the concerned defendants, it is directed that at present defendant No. 4 trust shall keep a sum of Rs. 30 lacs invested in such a manner that in the event of the plaintiff's succeeding in the suit, the said amount can be given to the plaintiff. Moreover, as and when any asset bequeathed under the will is disposed of, out of the sale proceeds 15% should be kept aside and should be invested in securities in which normally public charitable trusts are permitted to invest their funds. It is pertinent to note that defendant No. 4 is a trust and therefore the trust would be investing its funds only in certain securities. The amount so invested would be reasonably safe and therefore defendant No. 4 trust is directed to invest a sum of Rs. 30 lacs in securities

etc. at present and if the trust is having Rs. 30 lacs invested in such securities at present, it is not necessary for the trust to invest further amount because intention behind this order is to see that the plaintiff is not deprived of the funds which she might become entitled to in the event of her suit being decreed. Moreover, as stated hereinabove, defendant No. 4 is directed to keep aside 15% of the sale proceeds realised by defendant No. 4 trust as and when any of the properties bequeathed to the trust is sold.

17. In view of the above direction, the impugned order is modified to the above extent and the appeal is rejected with no order as to costs.

---

(hn)